UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 03-1691

NAMELOC, INC.,

Appellant,

V.

ABC, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
HON. G. THOMAS EISELE
U.S. District Court Case No. 4:02-CV-0714-GTE

APPELLANT'S BRIEF

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case involves an agreement between Appellant Nameloc, Inc. ("Nameloc") and Appellee ABC, Inc. ("ABC") wherein ABC was to purchase certain assets of Nameloc relating to the ownership and operation of radio station KYFX-FM ("the Station") in Little Rock, Arkansas. Specifically, pursuant to an Asset Purchase and Sale Agreement ("the Agreement") executed by the parties in early 2002, Nameloc became obligated to, *inter alia*, assign to ABC its license to operate the station, and to obtain an amendment to a lease Nameloc had with a third party, Joshua Broadcasting, Inc. ("Joshua"). Nameloc owned its own transmitter but rented the use of a broadcast tower owned by Joshua in order to operate Nameloc's transmitter ("the transmitter site lease").

Among the duties placed upon Nameloc in the Agreement was an obligation to participate with ABC in the joint filing of a form required by the Federal Communications Commission ("FCC") whenever a broadcast license is to change hands ("Form 314"). The time for filing the Form 314 was initially set out in the Agreement. However, Nameloc requested that the 314 not be filed until such time as the matter of a new site lease agreement between Nameloc and Joshua was resolved. Eventually, ABC filed suit in the United States District Court for the Eastern District of Arkansas alleging that Nameloc had breached the Agreement by not authorizing the

filing of the 314. ABC sought specific performance from Nameloc regarding the filing of the 314 and sought additional orders from the trial court[1] requiring Nameloc to meet other contractual obligations as they came due. Nameloc's position has consistently been that the original contract requirement of filing the 314 had been modified by agreement of the parties and it therefore did not breach the Agreement. Furthermore, Nameloc filed a counter-claim alleging that ABC improperly made use of the station's call letters which damaged Nameloc.

After the parties filed cross-motions for summary judgment, the trial court ruled that Nameloc's obligation under the Agreement to file the 314 by a particular date had been waived by ABC but that the waiver was temporary in nature and had long since expired and that Nameloc had therefore breached the Agreement. The trial court therefore entered summary judgment in favor ABC and against Nameloc on both ABC's amended complaint and Nameloc's counterclaim and ordered Nameloc to, by a particular date, authorize ABC to file the Form 314. This was done by Nameloc.

The position of Nameloc on appeal is that the trial court improperly invaded the province of the jury by making factual determinations regarding whether the Agreement was modified, to what extent it was modified, and whether, given the modifications, Nameloc had in fact breached the Agreement. Nameloc also contends that the district

[1]The Honorable G. Thomas Eisele, Senior District Judge.

court erred in granting summary judgment in ABC's favor as to that part of Nameloc's counterclaim having to do with the use of Nameloc's call letters.

Oral argument will assist the Court in understanding the issues Nameloc raises on appeal and is hereby requested. Nameloc requests thirty (30) minutes for oral argument.

CORPORATE DISCLOSURE STATEMENT

Appellant Nameloc, Inc. ("Nameloc") is a closely held corporation with its principal place of business located in Little Rock, Arkansas. Nameloc does not have a parent corporation. Furthermore, no publically held company owns ten percent (10%) or more of its stock.

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JURISDICTIONAL STATEMENT

The United States District Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §1332 since the dispute is in excess of $75,000.00 and the two parties are citizens of different states.

The United States Court of Appeals for the Eighth Circuit has jurisdiction over this case pursuant to 28 U.S.C. §1294 .

On February 18, 2003, the district court entered its order granting ABC's motion for summary judgment in all respects and denying the motion for summary judgment of Nameloc. (A.643-669)[2] On March 5, 2003, the district court issued its Order Granting Permanent Injunctive Relief. Nameloc then requested the order be stayed. (A.673-683) On March 11, 2003, the trial court denied the request (A.691-692) except to stay the order temporarily so that Nameloc could put before this Court its application for a stay, which was denied by this Court. In its March 11, 2003, Order the district court also "conclud[ed] that the March 5 order granting permanent injunctive relief is immediately appealable pursuant to 28 U.S.C. §1292(a)." (A.692)

On March 12, 2003, Nameloc filed its Notice of Appeal. (A.699)

[2]Future citations to the Joint Appendix submitted herewith will in the form of "A___"

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. *Whether the district court erred in determining that no issues of fact existed and that therefore ABC, Inc. was entitled to summary judgment as to all of its claims*

The most apposite case with respect to this issue is:

Nat'l American Ins. Co. v. Hogan, 173 F.3d 1097 (8th Cir. 1999)

II. *Whether the District Court erred in determining that no issues of fact existed and that therefore ABC, Inc. was entitled to summary judgment on Nameloc's counterclaim that ABC had breached the Agreement by improperly making use of the station's "call letters"*

The most apposite case with respect to this issue is:

City of Little Rock v. Ross Elec., Inc., 1995 WL 685798 (Ark. App. 1995)

STATEMENT OF THE CASE

Appellant Nameloc, Inc. appeals the order of the district court granting Appellee ABC, Inc.'s motion for summary judgment, entered on February 18, 2003. Nameloc asserts that certain material facts remain in dispute and should been reserved for determination by a jury.

STATEMENT OF FACTS

Nameloc is an Arkansas corporation owned by Ms. Loretta Lever House. Its principal asset is a licence to operate an FM radio station in North Little Rock, Arkansas, KYFX-FM, and its transmitter. Pursuant to operating the station, Nameloc also has leasehold interests in a studio it leases and a broadcast tower from which it transmits the station's radio signal.

On October 11, 2001, a media broker, Bill Whitley, sent a letter to Nameloc to inquire whether Nameloc was interested in selling its station. Mr. Whitley had previously learned at a trade show that Radio Disney, a division within ABC (which in turn is owned by the Walt Disney Company) was interested in acquiring radio stations in certain markets, including Little Rock, Arkansas. Ms. House had Mr. Wally Tucker, a broker with whom she had worked before, get in touch with Whitley to discuss whether Whitley truly knew of an interested buyer or was merely speculating.

On or about November 26, 2001, Radio Disney sent a proposed letter of intent

to Nameloc outlining general, non-binding terms of a proposed sale of the station to ABC, which Nameloc executed. Through December 2001 and January 2002, negotiations between Nameloc and ABC continued, resulting in a preliminary version of an "Asset Purchase and Sale Agreement" being created. The primary negotiators for the respective sides were Edgar J. Tyler, attorney for Nameloc, and Matthew McGinnis, in house counsel for ABC. After the exchange of various versions of the contract, on March 15, 2002, Mr. McGinnis sent a final version of the Asset Purchase and Sale Agreement, complete with assorted exhibits and schedules (collectively, the "Agreement") to Mr. Tyler for Nameloc's execution. On March 22, 2002, Mr. McGinnis faxed Mr. Tyler signature pages from ABC and the brokerage company. Three days later Mr. Tyler faxed to Mr. McGinnis the signature of Ms. House, Nameloc's president. March 25, 2002, has been designated as the execution date of the original Agreement, a copy of which is found in the Appendix . (A. 340-380).[3]

As alluded to above, Nameloc does not own its own broadcast tower. Rather, it leases space for its transmitter from Joshua Ministries and Community Development Corporation ("Joshua"), which is a corporate arm of a small church. The "transmitter site lease agreement" between Nameloc and Joshua was due to expire on May 1, 2002.

[3]As more fully detailed elsewhere in the brief, it is Nameloc's contention that the Agreement, as executed, was later modified.

The site lease then in effect between Nameloc and Joshua was silent as to whether Nameloc could assign the lease to another party without the consent of Joshua.

ABC was only purchasing certain assets of Nameloc, including the FCC license to broadcast, certain equipment, and Nameloc's interest in the leases to which it was a party for the office and studio as well as the transmitter site lease. Because Nameloc had no tower of its own from which to broadcast, but did have a site lease agreement with Joshua, ABC wanted Nameloc to assign to ABC its interest in the transmitter site lease. However, because the site lease between Nameloc and Joshua was silent as to assignability, and because the existing lease, by its own terms, was due to expire literally within weeks, the Agreement between ABC and Nameloc provided that Nameloc had to deliver to ABC, in a form required by ABC, an amendment to the then existing transmitter site lease agreement which would provide, among other things, an assignment of Nameloc's interest in the transmitter site lease agreement and an extension of its terms. More precisely, ¶7.2(h) of the Agreement provided as follows:

> **Affirmative Covenants**. Pending and prior to the Closing Date, Seller shall ...
>
> * * *
>
> (h) Consents. ... have entered into that First Amendment to the transmitter site lease with the lessor ***substantially in the form*** set forth in Schedule 1.1(a).

(emphasis added). (A.355)

The sample amendment to the site lease, which was attached to the Agreement as Schedule 1.1(a), spelled out five separate amendments or additions to the then current transmitter site lease between Joshua and Nameloc. The three most significant amendments contained therein were (i) an extension of the lease term for ten years until April 30, 2012, with an option to renew for an additional five years, (ii) an adjustment to the monthly rent, and (iii) the insertion of the following language having to do with assignment of the transmitter site lease:

> 4) The Lease, as amended hereby, shall be binding upon Lessor, Lessee and their respective successors and assigns. ***Lessee may assign the Lease as amended hereby without Lessor's consent***.

Form of First Addendum to Transmitter Site Lease (emphasis added). (A.371)

Obviously, the insertion of this language into the transmitter site lease agreement would enable Nameloc to assign its interest in the site lease to ABC without having to obtain the permission of Joshua. Further, the language requested by ABC would allow ABC in the future to freely assign the lease to any other entity without having to obtain the consent of Joshua. It should be mentioned that ABC had instructed Ms. House, owner and president of Nameloc, to not reveal the fact of ABC's involvement to Joshua while the amendment was being negotiated because of

ABC's fear that such knowledge on the part of Joshua would cause Joshua to raise the monthly rent for the tower significantly. *See Affidavit of Loretta House*. (A.381-

384)

Following the execution of the Agreement by both Nameloc and ABC, Ms. House began to experience unanticipated difficulty in persuading Joshua to sign the amendment to the site lease agreement. In fact, a cycle of events began wherein Ms. House would submit a proposed amendment of the site lease to Joshua containing language clearly making the lease assignable without Joshua's permission, followed by Joshua rejecting same and countering with a different version which would reinsert the disputed language. This cycle repeated itself several times throughout April and May of 2002. As pointed out, *infra*, the insertion of their preferred assignability language was the most important change to ABC.

The Agreement also required that within fifteen (15) business days after the Agreement was executed, the parties were to take steps to file with the FCC an application requesting assignment of the FCC licenses from Nameloc to ABC. Such an application is commonly known as a "Form 314." By agreement, ABC took certain steps to enable Nameloc to submit FCC information electronically, which slowed the parties' efforts to finalize the 314 application.

On May 2, 2002, Ms. House sent a memorandum to Mr. McGinnis (A.385) in which she explained that there had been a delay in hearing from Joshua about the most recent version of the transmitter site lease amendment because the church pastor had

been out of town. Ms. House wrote, in part:

> She [an assistant to the pastor] indicated the pastor is back in his office, has reviewed the lease agreement and made his changes. The agreement should be dropped off to her Friday morning and she will fax over the changes. If the changes are agreeable, we should be able to sign the lease agreement the same day.
>
> I'll fax the information to you for review as soon as I receive it Friday morning.
>
> I am also faxing to you the additional information you need to complete the 314.
>
> ***My husband and I would like to make sure everything is in order and agreed upon prior to filing the 314.***
>
> As we indicated in our discussion with you and Bill Whitley, we would like to cooperate and get the information completed and filed as soon as possible.

May 2 House Letter to McGinnis (emphasis added). (A.385)

On May 6, 2002, Ms. House faxed McGinnis a copy of the latest lease amendment she had received from Joshua. (A.387) Later that day, McGinnis replied to the two communications via facsimile. (A.388) First, he acknowledged receipt of the Form 314 information she had sent him and informed her that the information had been "inputted." He also agreed to the request of Ms. House (contained in the May 2, 2002 communication) that ABC would "not issue a press release until after the FCC grants its consent [to the license transfer]." McGinnis also pointed out parts of the

latest site lease which he found unacceptable and instructed Ms. House what revisions should be made, particularly rejecting Joshua's "veto power" over assignability. He reiterated how important it was to ABC that the transmitter site lease specify that it could be assigned without the permission of Joshua. In fact, Mr. McGinnis informed Ms. House that with regard to the transmitter site lease agreement: "the Lessee must have the right to assign the lease without obtaining the Lessor's consent. This is the most important change." *McGinnis Letter of May 6* (A.388)

Mr. McGinnis faxed back to Ms. House his requested changes to the transmitter site lease presented by Joshua wherein he again insisted on language providing for free assignability of the site lease without Joshua's consent. (A.389-392)

On May 8, 2002, McGinnis again faxed to Ms. House suggested language for changing the "assignability" portion of the site lease agreement. (A.393) Specifically, McGinnis suggested specific language be presented to Joshua in an attempt to get the free assignability clause that ABC wanted included in the addendum to the transmitter site lease. A few days later, Ms. House again faxed another version of the site lease amendment to Mr. McGinnis for his review.

On May 16, 2002, Matt McGinnis faxed Ms. House just before leaving his office for several days. (A.394) In his fax he instructed her to "[p]lease call either Carrie Bairunas ... or Townsend Davis ... to let them know that the lease is signed. ***They will then file the 314 with the FCC***." (emphasis added) (A.394)

On May 21, 2002, Ms. House faxed yet another version of the tower lease amendment to ABC's broker, Bill Whitely, and her own attorney, Edgar J. Tyler. (A.395) In this same communication she also inquired about the placement of an advertisement on the internet by ABC wherein ABC stated it was seeking employees for ABC's new Radio Disney station in Little Rock, Arkansas and falsely suggested that the station had already changed hands. She sought an explanation of why and how people were approaching her about supposedly vacant positions at the station.

On June 3, 2002, McGinnis faxed a letter to Ms. House (A.398) expressing his displeasure at the failure of the transaction to have progressed any farther than it had to that point. He referenced the "latest version of the transmitter site lease (prepared by the landlord and forwarded to me by Bill Whitley on May 23, 2002)." He informed Ms. House that if he were to receive, in two day's time, both her authorization to file the Form 314 and "a fully executed copy of the transmitter site lease, ABC will agree to amend the Agreement reflecting the increased monthly rent

and adding the landlord's approval to the schedule of consents to be obtained by Nameloc prior to closing." (A.398)

However, despite his mistaken reference to the contrary, the version of the site lease which McGinnis received from Whitely on May 23, 2002, which was the same version Ms. House had sent to Whitley that day via fax, was silent as to the issue of

assignability. When Joshua realized that it had sent a draft (unsigned) to Nameloc which omitted any reference to assignability, it made clear to Nameloc it would not sign that version of the site lease. *Affidavit of Loretta House*. (A.381) Once that fact was communicated to Ms. House, she was faced with the prospect of having to operate the station with no written tower lease at all, given that ABC had repeatedly made clear that it wanted a lease which was freely assignable and Joshua had made it equally clear that it would never agree to any arrangement where it gave up its right to approve of any assignment of the lease. *Deposition of Bennett*. (A.400-403) Therefore, on June 7, 2002, Ms. House signed a still newer version of the site lease (A.404) which was identical to the previous version (which she had sent to Whitley, and through him to ABC, on May 23, 2002) with the exception of the following added sentence (and the change in position of a second sentence):

"LESSEE may not assign this lease without LESSOR'S consent."

Lease Agreement at 2. (A.405) Such language was not acceptable to ABC. However, Nameloc had no choice but to enter into the transmitter site lease.

On June 6, 2002, Nameloc's counsel, Mr. Edgar J. Tyler, wrote Mr. McGinnis to discuss three points. First, he informed ABC that ABC's internet job posting of positions available at "Radio Disney KYFX, Little Rock, Arkansas" had caused Nameloc to incur damages in the form of lost revenue and disruption of the operation

of the station and that said conduct constituted a breach of the Asset Purchase and Sale Agreement. Second, he referenced ABC's acquiescence to Ms. House's proposal to make the filing of the Form 314 contingent on her first being able to obtain a satisfactory version of the tower site lease, and that obtaining same had essentially become a precondition to the filing of the Form 314. Third, he broached the subject of the two parties possibly entering into a license management agreement, or "LMA."[4]

On June 14, 2002, Mr. McGinnis responded to Mr. Tyler with a facsimile (A.406) and proposed another modification of the Agreement: If Nameloc would immediately consent to allowing the Form 314 to be filed, ABC would agree "to make the transmitter site landlord consent a condition to closing." Once the Form

314 were filed, ABC would enter into an LMA and pay Nameloc $10,000.00 per month through the time of closing.

Following a June 19, 2002, letter from Mr. Tyler to Mr. McGinnis, (A.408), stating Nameloc's position that the amount of money offered by ABC did not adequately address the damage caused by ABC's unauthorized use of the station's call letters, McGinnis responded with a letter to Tyler dated July 3, 2002. (A.409) In

[4]An LMA is (typically) an agreement whereby the proposed buyer of a station and license can immediately begin operating a station and replace the seller's programing with its own while the parties are still waiting for a Form 314 to be processed and (presumably) approved by the FCC. In the interim, the buyer essentially rents the license from the seller for an agreed amount, and uses it as its own, while the parties wait for the formal approval of the transfer by the FCC.

the letter he first denied the assertion of Nameloc that ABC has breached the Agreement by its use of the call letters of KYFX in the advertisements which it ran on the internet. McGinnis then referred to the first modification of the Agreement wherein ABC agreed to make the filing of the Form 314 contingent on Nameloc obtaining a site lease amendment conforming to the one set out in Schedule 1.1(a) of the Agreement:

> ***At the urging of your client, ABC granted a temporary waiver of Nameloc's FCC filing obligation until the transmitter site lease was completed***, with the understanding that such completion was being aggressively pursued by your client. I understand that the lease was signed in late May, and accordingly, Ms. House should have authorized the filing at that time.

July 3 Letter to Tyler at 2 (A.410)(emphasis added). The lease which was finally signed by Nameloc and Joshua was not "substantially in the form" required by ABC as set forth in Schedule 1.1(a) attached to the Agreement due to the fact that, among other things, it did not contain this language regarding assignability:

> 4) ... Lessee may assign the Lease as amended hereby without Lessor's consent.

Sample Lease Amendment at ¶4. (A.371) As stated, the matter of getting the assignability language changed was of paramount importance to ABC: "the Lessee must have the right to assign the lease without obtaining the Lessor's consent. This is the most important change." *McGinnis Letter of May 6* (A.388)

Finally, McGinnis withdrew ABC's June 14, 2002, (A.406) offer to make the

obtainment of a proper site lease agreement a precondition to closing. He characterized said offer as having been "conditioned on Nameloc's compliance with its obligation to file the FCC consent application," *i.e.*, the Form 314, and since "[Nameloc] has failed to comply, ... ABC's offer is withdrawn." *Id*. at 2. (A.407) He stated that ABC had informed Nameloc in his June 3, 2002, letter that Nameloc had materially breached the Agreement and had not cured same by July 3, 2002, thereby entitling ABC to seek its remedies in court.

Knowing that Joshua would not be willing to modify the terms of the new transmitter site lease it had recently executed with Nameloc to allow Nameloc to assign the lease without Joshua's permission, *see Deposition of Bennett* . (A.400-403) On August 2, 2002, Nameloc formally informed the escrow agent that ABC had

breached the Agreement and Nameloc therefore demanded payment of the escrow fund per the terms of the Agreement. On August 21, 2002, ABC sent the escrow agent its rebuttal notice and informed the agent that ABC would seek specific performance of the Agreement. In November of 2002, ABC filed this action.

On January 6 and 9, 2003, citing the failure of the transaction to close within the time allocated in the Agreement, and referencing the language of § 6.1(b) of the Agreement, Nameloc, through its counsel, by means of a letter to ABC Radio President John Hare, informed ABC that Nameloc was cancelling the Agreement

"since the closing has not 'occurred on or before the date that is nine (9) months after the date hereof.'" *January 9 and 13, 2003 Jiles Letters to Hare*, (A.412, 413) The termination of the Agreement by Nameloc was clearly permitted by § 6.1(b) of the Agreement.

SUMMARY OF ARGUMENT

The arguments related to the issues raised on appeal may be summarized as follows:

The district court granted ABC's motion for summary judgment as to every Count contained within ABC's Amended Complaint, together with every claim raised by Nameloc in its counterclaim. The issues presented by Nameloc are that material facts were in dispute as to both ABC's claims and Nameloc's counterclaim and that entry of summary judgment was improper. First, an important obligation of Nameloc under the original language of the Agreement was to jointly complete and submit with ABC the FCC's "Form 314." Nameloc asserts that it did not wish to take that step until such time as the matter of the site lease agreement with Joshua Broadcasting had been finally resolved and it therefore requested of ABC, and ABC agreed, that Nameloc be relieved from any obligation to file the Form 314 until such time as a new or amended transmitter site lease with Joshua had been obtained by Nameloc which was substantially in the form required by Schedule 1.1(a) to the Agreement. ABC's "in house" counsel handling the sale negotiations admitted that Nameloc's obligation under the Agreement for filing the Form 314 had been altered as requested by Nameloc, but asserted that it had merely agreed to a temporary "waiver."

Nameloc contended below, and asserts here, that whether the Agreement was modified or a provision waived, and whether the modification was temporary or not,

were fact issues for the jury and not for the district court to determine. Because the district court decided those issues itself, and in favor of ABC, it impermissibly invaded the province of the jury and should have denied the motion of ABC for summary judgment.

Similarly, as to that portion of Nameloc's counterclaim wherein it contends that ABC breached the Agreement by prematurely and falsely holding itself out as already owning the station, the district court made erroneous findings that ABC's act of identifying itself as the owner of the station and identifying the station as being a "Radio Disney" station was of no legal consequence. The district court ignored evidence that after ABC falsely identified the station as being part of "Radio Disney," the station suffered financially from a disruption of advertising revenues on account of advertisers not wishing to buy advertisements on a station with Radio Disney programming and listeners.

ARGUMENT

STANDARD OF REVIEW

In reviewing the trial court's grant of summary judgment, as to all issues the standard of review for this Court is *de novo*.

> We review the district court's grant of summary judgment de novo, applying the same strict standard as the district court. *Watson v. Jones*, 980 F.2d 1165, 1166 (8th Cir.1992). Therefore, we are required to view all of the evidence in the light most favorable to the nonmoving party and to give that party the benefit of all reasonable inferences to be drawn from the facts disclosed in the pleadings. *Id.* Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*; Fed.R.Civ.P. 56(c).

Reich v. ConAgra, Inc., 987 F.2d 1357 (8th Cir.1993)

I. ISSUES RELATING TO THE MODIFICATION WERE FOR A JURY

Whether the district court erred in determining that no issues of fact existed and that therefore ABC, Inc. was entitled to summary judgment as to all of its claims

ABC has alleged that Nameloc breached the Agreement due to Nameloc not timely consenting to the filing of the Form 314 with the FCC.[5] Nameloc does not dispute that at all times pertinent it had not consented to the filing of the Form 314. (Nameloc has since "consented" to the filing pursuant to the order of the district court.) Furthermore, Nameloc does not dispute that the Agreement as it existed at the time of its execution on or about March 25, 2002, required Nameloc to have consented

[5]The Form may not be unilaterally filed. Though ABC prepared it for electronic submission, it could not file it without Nameloc's permission.

within fifteen days of the execution of the Agreement to the filing of the Form 314. Rather, it is Nameloc's contention that Nameloc is not in breach of the Agreement because the Agreement was modified to make Nameloc's obtaining a new or amended transmitter site lease substantially in the form as that attached as Schedule 1.1(a) to the Agreement a precondition to Nameloc giving consent for filing the Form 314.

The Agreement was modified by the parties, at the request of Ms. House, after the date of its execution. Specifically, in Ms. House's May 2, 2002, "Memo" to Mr. McGinnis, she discussed the difficulty of obtaining a transmitter site lease agreement with Joshua that would satisfy ABC's requirement that any new or amended lease must provide for free assignability of the transmitter site lease without the permission of Joshua, and she requested that Nameloc not be required to file the Form 314 until after the transmitter site lease matter had been resolved. (A.385) After discussing the transmitter site lease, Ms. House informed ABC, "[m]y husband and I would like to make sure everything is in order and agreed upon prior to filing the 314." *See May 2, 2002 Memo from Ms. House to Mr. McGinnis* (A.385) ABC clearly agreed to Nameloc's request. Specifically, the Agreement was modified to make Nameloc's obtaining of a new transmitter site lease agreement substantially in the form as the exemplar attached to the Agreement a precondition to Nameloc having to file the Form 314. In Mr. McGinnis' facsimile to Ms. House on May 16, 2002, he directed her to "[p]lease call either Carrie Bairunas ... or Townsend Davis ... to let them know that the

lease is signed. They will then file the 314 with the FCC." *See May 16, 2002, Memo from Mr. McGinnis to Ms. House* (A.394) In a subsequent July 3, 2002, writing to Mr. Tyler, Nameloc's attorney, Mr. McGinnis acknowledged that ABC had waived the requirement to file the Form 314 until such time as a transmitter site lease substantially in the form of the exemplar attached to the Agreement was obtained by Nameloc as required by ABC.

However, such a lease containing free assignability as required by ABC could never be obtained. *See Deposition of Larry Bennett, CEO of Joshua*, at 16-17, 21-22, 26-27, (A.400,401-402,403), in which he states that Joshua would never enter into a transmitter site lease that allows for the assignment of the lease by a lessee without Joshua's consent. Specifically, Mr. McGinnis stated that, "[a]t the urging of your client, ABC granted a temporary waiver of Nameloc's FCC filing obligation until the transmitter site lease was completed ... ." *See July 3, 2002, letter from Mr. McGinnis to Mr. Tyler* at p. 2 (A.410)(emphasis added). This admission forecloses any argument that the May 16, 2002, Memo from Mr. McGinnis to Ms. House was anything short of an agreement on ABC's part to modify the Agreement and make the

obtaining of the transmitter site lease in substantially the form as that set forth in

Schedule 1.1(a) of the Agreement as a precondition to filing the Form 314.

In the order granting ABC's motion for summary judgment, the district court acknowledged that the obligations of Nameloc as described in the original form of the Agreement had been altered. Mr. McGinnis admitted as much in his letter of July 3, 2002. However, the district court concluded, after first deciding that it was for the court and not the jury to determine whether the Agreement had ever been changed, that the change was merely a "temporary waiver" and that "clearly, it was not a duly executed amendment to the Agreement." *Order* at 20 (A.662) The district court essentially found that if a change in the Agreement did not conform to the methodology provided in the Agreement, then any change to the Agreement, by definition, was not an "amendment" and therefore must be a "waiver." Furthermore, because the Agreement had a provision governing "waivers," then "any waiver under the Agreement is limited by the extent expressly specified in the waiver." *Order* at 20 (A.662)

Based on this erroneous legal assumption that the parties could not change the Agreement except by means specifically spelled out in that Agreement, the district court then "found" that the waiver was limited in time and only existed until such time as the transmitter site lease dispute was resolved. The district court then made

the determination that the dispute had in fact been resolved because ABC had

"accepted" the lease Nameloc eventually signed with Joshua. *Order* at 21 (A.663) Nameloc contends that ABC never accepted the new lease for all purposes, including closing, that such acceptance for all purposes was what, in fact, the parties had agreed to when the Agreement was modified, and that the dispute was therefore never resolved. Nameloc further contends that the district court therefore impermissively decided factual issues which were in dispute and therefore its entry of summary judgment in favor of ABC was improper.

* * *

Nameloc submits that the district court made a succession of small errors, each contributing to the next, the net effect of which was the removal of the case from the hands of a jury, by whom certain critical disputes of fact should have been decided rather than by the district court.

First, the district court made a great distinction between "amending" the Agreement versus ABC "waiving" a provision of the Agreement that placed a certain duty upon Nameloc. This is a distinction without any meaning in the caselaw. The original form of the Agreement with the respective rights and duties it placed on the two parties was either changed or it was not. What one decides to call the change is of no legal consequence. "What's in a name? A modification, by any other name, ..." The district court obviously thought the name by which the modification was

referred was significant because the court was also of the opinion that the only way the Agreement could be modified was by the strict provisions found in the Agreement, which provided separate paragraphs addressing "waiver" and "amendment."

However, the district court was in error to find that the parties were bound by the Agreement's specified procedures for modifying the Agreement.

It has long been the law that:

> Any persons competent to make a contract can as validly agree to rescind it as they could agree to make it in the beginning. It is entirely competent for parties who have entered into a contract to modify it, to waive their rights under it, to vary or modify its terms, or to substitute a wholly different contract from the original one. And this may be done by mutual consent ....
>
> *First Nat'l Bank v. Tate*, 178 Ark. 1098, 13 S.W.2d 587, 589 (1929); *see also Southern Acid & Sulphur Co. v. Childs*, 207 Ark. 1109, 184 S.W.2d 586, 588 (1945) (quoting 17 C.J.S., Contracts, § 374 which states that "a provision in the contract as to the method of change is not exclusive of other methods of modification"); Corbin on Contracts § 1295 ("Any written contract ... can be rescinded or varied at will by ... agreement of the parties …. *Two contractors cannot by mutual agreement limit their power to control their legal relations by future mutual agreement*.").

National American Insurance Co. v. Hogan, 173 F.3d 1097 (8th Cir. 1999)(emphasis added).

Thus, parties to a contract are at liberty to modify their agreement by any means, even by oral agreement. "It is well settled that a written contract may be

modified by a later oral agreement." *Shumpert v. Arko Telephone Communications, Inc.*, 318 Ark. 840 (1994), *citing O'Bier v. Safe-Buy Real Estate*, 256 Ark. 574 (1974). If there is conflicting evidence whether an agreement has been modified, a fact issue exists and the matter should be put to a jury. "At the least, a fact issue existed concerning whether the parties' original contract had been orally amended and when SSS breached that amended agreement." *Shumpert v. Arko Telephone Communications, Inc.*, 318 Ark. at 843.

An intent to modify some or all of a preexisting contract may be established by not only the express words of the parties, but by inference from facts and circumstances relating to the transaction. *National American Insurance Co. v. Hogan*, 173 F.3d at 1107 (8th Cir. 1999); *Elkins v. Henry Vogt Mach. Co.*, 125 Ark. 6 (1916). If the parties do not expressly declare their intent to substitute new provisions for old, a fact issue is presented for the jury. That is precisely what occurred in *National American Insurance* when this Court affirmed the Hon. Judge Woods' decision to make that a jury question.

> In this case, the parties did not expressly declare their intent to substitute the 1994 agreement for the earlier [ones]. Thus, *the issue was one of fact* and properly given to the jury. *See Alston v. Bitely,* 252 Ark. 79 (1972) ("The [intent] issue *is one of fact* if there is any conflicting evidence or if the terms of the agreement are capable of more than one construction."); *International Minerals & Chem. Corp. v. Caplinger*, 241 Ark. 1055, 411 S.W.2d 526, 528 (1967) (finding *a fact issue for the jury as to intent*

> to release initial obligor from liability on debt through subsequent agreement); Williston on Contracts, at § 1869 ("Whether a new debtor is intended to operate as a release of the liability of the old in the absence of an express agreement to that effect, is usually *a question of fact* and can only become a question of law when the state of the evidence is such that reasonable minds cannot differ as to its effect.").

National American Insurance Co. v. Hogan, 173 F.3d at 1107-08 (footnote omitted)(emphasis added).

In the case at bar there is no doubt that the parties agreed to change the Agreement (ABC's chief negotiator admitted as much) but the revised terms "are capable of more than one construction," thereby creating a fact question. Ms. House, President of Nameloc, contends that the new terms were to allow for no filing of the 314 until any and all issues concerning the new site lease agreement had been put to bed once and for all, including the new lease being acceptable to ABC for not only purposes of filing the 314 but for closing as well. *House Affidavit* at 2 (A.382) Nameloc also contends that ABC never "accepted" the lease. ABC, on the other hand, views the new terms differently. These conflicting interpretations of the changes to the Agreement therefore yield a fact question. The district court's use of disputed extrinsic evidence makes this a fact question. *Amerdyne Industries, Inc. v. POM, Inc.*, 760 F.2d 875 (8th Cir. 1985), *citing Arkansas Rock & Gravel Company v. Chris-T-Emulsion Company*, 259 Ark. 807 (1976). It was error for the district court

to prevent the jury from getting to decide these fact questions. Because material facts were in dispute, summary judgment in favor of ABC should not have been entered.

There is no dispute that ABC through its in-house counsel sent two (2) writings signed by its corporate representative and in-house counsel, Mr. McGinnis, modifying the Agreement to waive the Form 314 filing requirement until such time as Nameloc obtained the transmitter site lease agreement substantially in the form attached Schedule 1.1(a) to the Agreement. Subsequent to Nameloc's May 2, 2002, Memo to ABC in which Nameloc discussed the difficulty of obtaining the transmitter site lease substantially in the form required by ABC pursuant to Schedule 1.1(a) of the Agreement, and requested that the filing of the Form 314 be delayed until the transmitter site lease required by ABC was obtained, ABC sent two (2) signed writings, *i.e.*, Mr. McGinnis' May 16, 2002, Memo and his July 3, 2002, letter, in which ABC agreed to wait to file the Form 314 until after Nameloc obtained the transmitter site lease substantially in the form of Schedule 1.1(a) to the Agreement. *See May 16, 2002, Memo from Mr. McGinnis to Ms. House* and *July 3, 2002 letter from Mr. McGinnis to Mr. Tyler*. (A.678, 693) Mr. McGinnis unequivocally stated:

> "at the urging of your client, ABC granted a waiver of the filing of Nameloc's FCC filing obligation until the transmitter site lease was accepted."

This certainly should have precluded the district court granting ABC's motion for summary judgment.

ABC *never* waived the requirement of obtaining a transmitter site lease substantially in the form set forth as Schedule 1.1(a) to the Agreement. In fact, Mr. McGinnis, in-house counsel, testified that each of the transmitter site lease agreements presented to ABC by Nameloc which were agreeable to Joshua contained differing terms and conditions than the terms and conditions set forth in the "First Amendment to the Transmitter Site Lease" required by ABC and attached as Schedule 1.1(a) to the Agreement. The only transmitter site lease which Nameloc was able to obtain from Joshua was *not* substantially in the form set out in Schedule 1.1(a) of the Agreement. Specifically, the key provision regarding assignability contained in the new transmitter site lease eventually executed between Nameloc and Joshua is substantially different from the assignability provision contained in Schedule 1.1(a) of the Agreement, *i.e.*, the new lease does not provide for assignment of the lease without Joshua's consent while the First Amendment to Transmitter Site Lease required by ABC specifically provided that such permission was not necessary. The lack of free assignability is the very reason that ABC rejected every version of the transmitter site lease Joshua was agreeable to accepting. Mr. Bennett, CEO of Joshua, testified as to the numerous drafts of the transmitter site lease he exchanged with Ms. House, President of

Nameloc, prior to the June 7, 2002 version that was finally executed by Nameloc and Joshua. According to Mr. Bennett, one fact was always certain: Joshua would never enter into a transmitter site lease that provided for free assignability. In fact, Mr. Bennett testified that:

> Mr. Bennett: We've seen this one. What I'm trying to find out is we sent so many documents back and forth on the fax. I wanted to be sure – there's several documents that we sent back and forth on the fax. The last one that we had settled upon had that clause in it, I think I eventually signed it, that limited the assignability of it.
>
> Mr. Jiles: We'll give you a minute to look at that?
>
> A: (Witness viewing document.) Yeah. This is one of the earlier ones that we had transmitted back and forth. This last sentence in the agreement we eventually changed. This one here says, "This agreement is binding on the successor and assigns of each party." And of course we limited that. That was one of the things that we wanted to change, and we did change in there.
>
> Q: So this particular version of the transmitter site lease, this being Exhibit Number 2, was rejected by Joshua, correct?
>
> A: Right.
>
> Q: Was not acceptable?
>
> A: Right.
>
> Q: And as I understand your testimony, one of the reasons it wasn't acceptable was because it didn't limit the

assignability?

A: Uh-huh.

Q: Was that not one of the most important considerations to Joshua, the assignability issue?

A: It was for us, yes.

Q: And does it remain so today?

A: It does.

* * *

Mr. Jiles: If you'll look with me, Mr. Bennett, over to the second page next to the last sentence says, "Lessee may not assign this lease without lessor's consent?"

Mr. B: Right.

Q: That's the provision I think you earlier testified that was very important to Joshua?

A: Right.

Q: Would you – would Joshua ever enter into a transmitter site lease with any individual or entity that did not contain that language?

A: No. ... .

* * *

See Deposition of Mr. Bennett at 16-17, 20-21, 25-26 .(A.400-403)

It was subsequent to Mr. Bennett's deposition, that ABC for the very first time decided that it would be willing to accept the June 7, 2002, transmitter site lease that Nameloc and Joshua had entered into and which did not contain the free assignability

language which ABC so desperately wanted. On January 13, 2003, Mr. John Paul Colaco, President of Radio Disney, sent a letter to Joshua proposing to accept the June 7, 2002, transmitter site lease between Nameloc and Joshua with certain amendments, including a substantial rent increase. *See January 13, 2003, letter from Mr. Colaco to Joshua.* (A.414) *However*, Nameloc points out that ABC attempted to accept the transmitter site lease only *after* Nameloc sent a letter on January 9, 2003, to ABC terminating the Agreement, as permitted by §6.1(b) of the Agreement, since the transmitter did not close within nine (9) months after the March 25, 2002, execution date of the Agreement.[6] Since the Agreement as modified relieved Nameloc of its duty to file the Form 314 until such time as a transmitter site lease was obtained which was substantially in the form of Schedule 1.1(a) attached to the Agreement, and since a transmitter site lease was not and could not be obtained which was substantially in the form of Schedule 1.1(a), i.e., one containing a free assignability provision,

[6]It may now be true that ABC has finally come to terms with Joshua with regard to an acceptable site lease agreement. If so, Nameloc anticipates that ABC will argue that such an occurrence would render moot Nameloc's argument that it did not have to file the 314 as long as the site lease agreement was unresolved. However, there is no evidence that as of the time Nameloc sent the cancellation letters due to the transaction not having timely closed that the matter had been resolved. Thus, the matter is most decidedly not moot: if a fact finder were to determine that the terms of the modification were, as Nameloc contends, that Nameloc had no duty to file the 314 until the site lease issue was resolved, and if through no fault of Nameloc the transaction did not close within the requisite time, then not only was Nameloc not in breach by not filing the 314, Nameloc's notice to cancel the deal should be given effect. Thus, the issue is not moot.

Nameloc is not in breach of the Agreement.

II. NAMELOC'S COUNTERCLAIM

Whether the District Court erred in determining that no issues of fact existed and that therefore ABC, Inc. was entitled to summary judgment on Nameloc's counterclaim that ABC had breached the Agreement by improperly making use of the station's "call letters"

ABC does not now and did not ever own the rights to the call letters "KYFX." They are the intellectual property of Nameloc and were specifically excluded from the purchased assets as described in the Asset Purchase and Sale Agreement. The reason Nameloc made it a requirement of the Agreement that ABC not be permitted to use these call letters was to prevent precisely the sort of damage that did, in fact, occur when ABC violated that term of the Agreement. The simple fact is this: ABC did not have permission to use the call letters, the Agreement prohibited them from doing so, and, when ABC violated that Agreement, Nameloc was damaged significantly as discussed in Nameloc's Motion for Summary Judgment and Brief in Support.

Section 1.1(e) of the Agreement specifically states that the following assets are excluded from the Agreement: "the right to use the name of Seller, the KYFX call letters, Seller's website and trademarks held by seller in regard to FOXY 99.5." (A.341) Similarly, under "Section 1.2 Excluded Assets," sub-paragraphs "f" and "g" identify as excluded from the purchase: "the right to use the corporate name of Seller; and ... the Station's call letters, Seller's website and trademarks held by Seller in

regard to FOXY 99.5." (A.342)

ABC has admitted in its Brief in Support of its Motion for Summary Judgment that it posted the call letters on the internet. ABC argues that it does not matter that it committed this violation of the Agreement because the violation occurred after the deadline for filing the Form 314 with the FCC. This argument fails because the Agreement was modified by ABC's agreement to waive the filing requirement until after a lease substantially in the form required by ABC and set forth in Schedule 1.1(a) of the Agreement was obtained by Nameloc, as discussed above. Furthermore, ABC's argument offered below that FCC regulations required it to make certain public announcements which would necessarily involve the use of the station's call letters conveniently omits the fact that said public announcement would only take place *after* a Form 314 were filed. ABC cannot get around the fact that (i) its representation that the station was already part of Radio Disney was false, and that (ii) said fake statement contributed to financial losses suffered by Nameloc. This action constituted material breach of the Agreement by ABC.

Finally, any argument by ABC that its violation of the Agreement was not a material breach of the Agreement is one that should be decided by a jury. Similarly, the issue of whether Nameloc was relieved from its obligations under the Agreement because ABC committed a prior material breach of contract by using the call letters

presents an issue of fact that should be decided by the jury. *See City of Little Rock v. Ross Elec., Inc.*, 1995 WL 685798 (Ark. App. 1995).

CONCLUSION

For the foregoing reasons, the district court's orders granting ABC's motion for summary judgment and ordering Nameloc to file the 314 should be reversed and this matter remanded to the district court for trial. Also, the district court's finding that summary judgment should be entered in ABC's favor on that part of Nameloc's counter-claim relating to ABC's unauthorized use of the call letters should also be reversed. Further, this Court should order ABC to cooperate with Nameloc in withdrawing the submitted Form 314 and restore the *status quo ante* vis-a-vis the

filing until such time as this matter is tried.

Respectfully submitted,

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May 8, 2003

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type/volume limitation of Rule 32(a)(7) of the Federal Rules of Appellate Procedure. This brief was prepared in Word Perfect 9 using Times New Roman #14 font. It contains 8,981 words according to the word count generated by Word Perfect.

I am informed that the diskette accompanying this brief has been scanned and that it is virus free.

_____
Gary D. Jiles

CERTIFICATE OF FILING

I hereby certify that on May 8, 2003, I entrusted ten copies of Appellant's Brief, together with ten copies of the jointly submitted Appendix, to Federal Express for overnight delivery to the Clerk of the United States Court of Appeals for the Eighth Circuit, Thomas F. Eagleton Court House, Room 24.329, 111 S. 10th Street, St. Louis, MO 63102. I also enclosed a copy of the brief on a disk which had been scanned for, and was free of, viruses.

_____
Gary D. Jiles

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that on this 8th day of May, 2003, a copy of the foregoing Appellant's Brief and the Appendix have been served via U.S. Mail, postage prepaid, on the following:

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